

## REASON IN ALL ITS SPLENDOR

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My intention is to celebrate *Goldberg v. Kelly*, but that task is complicated by the fact that there are two decisions that go by that name.

The first was decided twenty years ago and is the ostensible subject of this symposium.<sup>1</sup> It required an adversarial hearing prior to the termination of welfare benefits, and in so doing developed the law along two different axes. The so-called due process revolution of the 1960s was extended from the criminal to the civil domain, and the procedural protections traditionally afforded to the property of the privileged classes were now to be provided to the property of the less fortunate.

Although the outcome in *Goldberg v. Kelly* was singular and in that sense remarkable, its underlying method or jurisprudence was not. Justice Brennan wrote for the majority, and in doing so, employed a method that characterized the Court's work for the prior twenty-year period and that produced a body of decisions—*Brown v. Board of Education*,<sup>2</sup> *Reynolds v. Sims*,<sup>3</sup> *Gideon v. Wainwright*,<sup>4</sup> *New York Times v. Sullivan*,<sup>5</sup> and *Engle v. Vitale*<sup>6</sup> are a few examples—that have come to define judicial review as we know it and that for some time now have been an inspiration for all the world.

The method of all these decisions was, I believe, entirely rationalistic: The justices reflected upon the values and ideals of the Constitution and sought to understand what those ideals

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<sup>1</sup> 397 U.S. 254 (1970).

<sup>2</sup> 347 U.S. 483 (1954).

<sup>3</sup> 377 U.S. 533 (1964).

<sup>4</sup> 372 U.S. 335 (1963).

<sup>5</sup> 376 U.S. 254 (1964).

<sup>6</sup> 370 U.S. 421 (1962).

would require in the practical world they confronted. In *Brown v. Board of Education*, for example, the justices had to give content to the ideal of racial equality embodied in the fourteenth amendment and to ascertain whether the dual school system was consistent with that ideal, that is, whether segregated schools were inherently unequal. In *Goldberg v. Kelly*, the value was not racial equality but procedural fairness—the nature of the process due to a citizen before the state could deprive that citizen of liberty or even property—but the decisional process was essentially the same.

In calling this process rationalistic, I mean to underscore its discursive nature: The justices listen to arguments about a broad range of subjects—the facts, the history surrounding the laws in question, earlier cases, and the precise wording of the text. This argument goes on with the lawyers, among the justices and their clerks and among the justices themselves. The justices also think about all that they heard and try to evaluate the strengths and weaknesses of the arguments. Thinking itself is an interiorization of the discursive process, a continuation of the argument but now wholly within the individual. Thinking is, as Hannah Arendt put it, “the soundless dialogue . . . between me and myself.”<sup>7</sup> The process of deliberation comes to a conclusion at the moment of decision, at which time the decision is publicly announced and the justices set forth their reasons for it.

Given its deliberative character, the judicial decision may be seen as the paragon of all rational decisions, especially public ones. It differs from other decisions only by virtue of the rules or standards which determine what counts as a good as opposed to a bad argument, or as a good as opposed to a bad reason. A member of the city council trying to decide what should be done with public funds, or the superintendent of a park confronting a similar predicament, might consider facts, reasons, or arguments that a judge would not, because of differences in their offices. But each is obliged to decide questions rationally and thus engage in the deliberative process which is the essence of judging and, for that matter, of law itself.

Some portion of this deliberative process is addressed to the elaboration of ends, some to the means for achieving those ends.

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<sup>7</sup> H. ARENDT, *THE LIFE OF THE MIND* 185 (1971).

The latter goes by the name of instrumental rationality, by which a particular end is stipulated and the decision maker tries to identify the best means for achieving that end. Judgments of this type are almost technocratic in nature and tend to dominate the remedial phase of a law suit, in which the judge formulates a plan for bringing a recalcitrant reality into conformity with the norms of the Constitution. What kind of decree, the judge might ask, would most effectively instill within the welfare bureaucracy a proper regard for procedural fairness? On the other hand, the explication of the ideal of procedural fairness, a judgment as to whether due process requires a hearing prior to termination of welfare and what that hearing might consist of, is not technocratic or instrumental, but deeply substantive or normative. It focuses on ends, not means, and on the relationship of these ends or values to social practices, in this instance, the welfare system.

While instrumental reasoning dominates the remedial phase, substantive or normative reasoning—that is, the refinement and elaboration of ends through the process of deliberation—is the essence of the right-declaring phase of adjudication. In my view, that aspect of adjudication is foundational, for the authority of the judiciary is linked to substantive rationality.<sup>8</sup> The independence of the judiciary and its commitment to public dialogue are the source of the judiciary's special claim to competence, and thus the source of its authority, yet the competence that is produced by independence and public dialogue has more to do with normative than technocratic judgments. We give power to the judiciary because it is "the forum of principle," to use Dworkin's phrase,<sup>9</sup> not because it has a corner on the social technologies of the world, not because it is more adept than the legislature or the executive in devising the best means for realizing some stipulated end. In fact, we allow the judiciary the power to make instrumental judgments and to be decisive in that domain—to be supreme in the formulation and administration of the remedy—only as a way of protecting or safeguarding its declarations of principle or right. In celebrating the Warren Court, and the doctrine that it created, one has in mind more what that institution said about substantive ends—equality, free

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<sup>8</sup> Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

<sup>9</sup> Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

speech, religious liberty, and procedural fairness—than the technologies it devised to achieve those ends. This is true of *Goldberg v. Kelly*, which was, in my judgment, largely an exercise in, and a triumph of, substantive rationality.

Triumph it was, but the travails of that case, and of the entire jurisprudence that it exemplified, began in the early 1970s, at the very moment the decision was rendered. *Goldberg v. Kelly* marked the end of one era, and the beginning of another. It was announced as American culture turned inward and we began to lose faith in the Constitution as an embodiment of a public morality to be known and elaborated through the exercise of reason. In the academy, the doubts that characterized the seventies informed and accounted for the rise and extraordinary success of the law and economics movement, a movement that believed in reason, but only of the instrumental variety.

Law and economics is premised on the idea that there are no public values or ideals about which judges should reason. Ideals exist, but only at a personal or individual level, and as such are not fundamentally different from an individual's interests, desires, or preferences—none of which are especially amenable to reasoned elaboration. Law and economics also assumes that it is arbitrary for any social institution, but especially the judiciary, to choose among these preferences; all preferences are entitled, to use Bork's formula, to equal gratification.<sup>10</sup> In practical terms this means that there can only be one end for social institutions: maximizing the total satisfaction of individual preferences, or as Posner has characterized it,<sup>11</sup> increasing the size of the pie, as opposed to deciding how it should be divided. The task that remains for the judiciary under this formulation is essentially technocratic: devising or choosing the rules that are the best means for increasing the size of the pie. To say, as law and economics does, that "law is efficiency," implicitly hypothesizes a single, uncontested end and relegates the judge to formulating rules—the instruments—that best serve that end.

Law and economics, and its special brand of instrumentalism, has not been confined to the academy. It has had an impact

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<sup>10</sup> Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 10 (1971).

<sup>11</sup> Posner, *Wealth Maximization and Judicial Decision Making*, 4 *INT'L REV. L. & ECON.* 131, 132 (1984).

on private law, and has even managed to find its way into constitutional doctrine. For example, the three-prong test Justice Powell announced in *Mathews v. Eldridge*<sup>12</sup> for deciding due process questions bears a striking similarity to a formula that Richard Posner had proposed earlier. For Posner, the judge confronted with a claim for new procedure must compare the cost of the proposed procedural innovation against the benefits it is likely to produce, and those benefits are to be calculated by multiplying the costs of an error by the chance of it occurring if the proposed procedure is not instituted.<sup>13</sup> In *Mathews v. Eldridge*, Justice Powell wrote:

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail . . . .<sup>14</sup>

As can be seen, Justice Powell's formula confuses the matter slightly by adding to the equation a term that was already there (the value to the individual of the new procedure was already reflected in the error costs), but in spirit and conception, Powell's formula is the same as Posner's. Both understand procedure in purely instrumental terms, as though it is a machine dedicated to reducing erroneous outcomes. They believe the machine should be acquired if the costs of buying and operating it are less than the benefits likely to be produced, that is, if the machine is efficient.

Such a model for deciding procedural questions can be criticized, and has been, on the ground that it assumes an intellectual capacity that simply does not exist. Operationalizing the cost/benefit methodology requires quantifying factors that cannot be quantified, and any attempt to engage in such an exercise will be worse than useless—it will tend to drive out of the deci-

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<sup>12</sup> 424 U.S. 319 (1976).

<sup>13</sup> Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 441-42 (1973).

<sup>14</sup> 424 U.S. at 334-35.

sional process the so-called "soft variables," those values that are most important to any understanding of procedural fairness.<sup>15</sup> For me, however, the failure of law and economics and the *Mathews v. Eldridge* approach is of another order: it derives not simply from the attempt to quantify that which cannot be quantified, but from the reduction of due process and for that matter, the entire judicial judgment, to instrumental terms.

From my perspective, a justice charged with the duty of construing the due process clause, as Justice Brennan was in *Goldberg v. Kelly*, should be seen as engaged in a process of trying to understand what it means for a society to be committed to procedural fairness, and to elaborate that understanding in a certain practical context. According to law and economics and *Mathews v. Eldridge*, however, the judicial task is transformed into one of choosing an instrument, a means, or a technology that would serve some specific and relatively uncontested end, such as reducing the number of erroneous outcomes, or stated more generally, increasing the size of the pie. Such a view trivializes and distorts the judicial task entailed in the explication of due process and can be faulted on that ground; it also should be noted that it puts the authority of the judiciary into question, for the instrumentalization of reason eradicates that portion of the judicial decision that is the foundation of its authority—the deliberation about ends and values. There is no good reason for the judiciary to second-guess the legislature or the executive on purely instrumental questions, and as a result, an attitude of deference and passivity on the part of the judiciary becomes all the more appropriate.

A professor writing a casebook on procedure in the late 1970s and 1980s, as I did with Robert Cover and Judith Resnik, might well have been advised to begin with *Mathews v. Eldridge*. It sets forth the test that students will have to master and use in their immediate professional lives. In terms of doctrinal literacy, *Mathews v. Eldridge* seems more relevant than *Goldberg v. Kelly*. But the overarching purpose of our book and the course that it spawned is not to instill a doctrinal literacy (though that occurs, one way or another), but to give the stu-

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<sup>15</sup> Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48 (1976).

dents an insight into the process by which the judiciary should decide procedural questions. The decision to begin with *Goldberg v. Kelly*, and my inclination to stay with it in my classes week after week after week is, I now confess, a deliberate and systematic confrontational strategy. It is intended to deny the instrumentalism of *Mathews v. Eldridge* and to expose my students to substantive rationality and what it has meant and could mean for the judicial power and for American society.

This pedagogical strategy might be thought to have its merits, but matters became unusually complicated a few years ago—our casebook was in production but had not appeared—when, much to my surprise, a second version of *Goldberg v. Kelly* appeared, not in the United States Reports, to be sure, but in the Record of the Association of the Bar of the City of New York.<sup>16</sup> I am referring to Judge Brennan's speech before the Association in September 1987, a speech in which he gave another account of the underlying jurisprudence of that case. He stayed clear of the instrumentalism of law and economics and of *Mathews v. Eldridge*, but nonetheless challenged my understanding of *Goldberg v. Kelly* as a triumph of substantive rationality. He introduced a new element into the decisional process: passion.

Justice Brennan did not deny any role for reason (either of the instrumental or substantive kind), but insisted that any account of *Goldberg v. Kelly* that did not include room for the emotional or affective elements would be incomplete and inadequate. He also quoted a passage from one of the briefs describing the plight of some of the welfare recipients involved in the case, and characterized that passage in terms of a form of discourse that seems especially tied to the emotive faculty. He saw the brief as telling "human stories."<sup>17</sup> While arguments, whether they be of fact or principle, seem especially addressed to the faculty of reason, storytelling seems more suited to stirring emotions.

The principal burden of Justice Brennan's discussion of *Goldberg v. Kelly* before the Bar Association was to criticize the

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<sup>16</sup> Brennan, *Reason, Passion, and "The Progress of the Law," The Forty-Second Annual Benjamin N. Cardozo Lecture*, 42 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 948 (1987), reprinted in 10 CARDOZO L. REV. 3 (1988).

<sup>17</sup> *Id.* at 21.

welfare bureaucracy for having become captured by "the empire of reason";<sup>18</sup> but I understand him to be making a point about all government officials, including judges. He said as much, and underscored the role of passion in judicial decision making—in *Goldberg v. Kelly* itself—by taking Justice Cardozo as his point of departure. Of Cardozo, Justice Brennan said, "He attacked the myth that judges were oracles of pure reason, and insisted that we consider the role that human experience, emotion, and passion play in the judicial process."<sup>19</sup>

Many factors account for the tremendous stir caused by Justice Brennan's speech, not the least of which is that it coincided with the emergence of a new jurisprudential movement in the academy—spearheaded by critical race theorists<sup>20</sup> and certain feminists<sup>21</sup>—that also places a premium on passion and storytelling. These scholars tend to be leftist critics of the Court's work, and appear to be the natural successors to critical legal studies, which also emphasized the role of passion.<sup>22</sup> But unlike the practitioners of critical legal studies, the scholars I am referring to believe in rights, and in the redemptive possibility of law, and draw their inspiration from a broad range of theoretical works that have gained greater and greater ascendancy in the academy over the last decade.<sup>23</sup> I am sure Justice Brennan would be surprised to learn that his speech lent comfort and support to a new jurisprudential movement, especially one so hostile to much of the Court's work,<sup>24</sup> but it has turned out that way, and a number of these scholars have returned the favor by

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 5.

<sup>20</sup> See, e.g., Bell, *The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Williams, *Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response in Law and Law Reform*, 42 U. MIAMI L. REV. 127 (1987).

<sup>21</sup> See, e.g., Minow & Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988). Some read CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) in these terms, but I do not. She has been meticulous in presenting her position as an enrichment of reason.

<sup>22</sup> R. UNGER, *PASSION* (1984). Duncan Kennedy's "fundamental contradiction" had been framed in terms of passion—the love of others and the fear of others. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979).

<sup>23</sup> Here I especially have in mind the work of MARTHA NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* (1986), and some of the writing of the law and literature movement. See, e.g., Gewirtz, *Aeschylus' Law*, 101 HARV. L. REV. 1043 (1988).

<sup>24</sup> See Delgado, *supra* note 20.



endowing his speech with a measure of visibility and energy that is indeed stunning. Judging from the reaction of my students and some of the commentary published in response to Justice Brennan's speech,<sup>25</sup> the second version of *Goldberg v. Kelly* stands at the verge of supplanting the original.

Mention of Cardozo makes it worth emphasizing at the outset that I do not believe that Justice Brennan was engaged in an exercise in realism and thus merely restating the obvious: Judges are people, and as much as they strive to be rational, emotion and passion inevitably creep into the judicial process. If that were all that were involved, I would have no objection. The presence of passion could be safely acknowledged, though on the understanding that it must always be disciplined by reason. My concern arises, however, from the fact that Justice Brennan was not content with repeating the realist's observation, but instead quickly moved from the descriptive to the normative. He celebrated passion as a factor that *should* enter the decisional process and criticized Cardozo for not sufficiently encouraging or valuing, as opposed to merely acknowledging, the "dialogue between heart and head."<sup>26</sup> For Brennan, passion must be seen as a part of the judicial ideal.

Rational deliberation, whether it be about ends or means, is no easy endeavor. It requires an enormous amount of mental and physical effort, and it always leaves one with an uneasy feeling: Have I done the right thing? I speak from rather mundane personal and professional experiences, but I am sure the agony of decision increases with the magnitude of the responsibility. The sense of uncertainty that a justice must feel, either at the moment of decision or when he or she is reflecting on past decisions, must be excruciating. It always struck me as a measure of Justice Brennan's greatness that he was not overwhelmed by self-doubt, that he was able to push on to judgment, day in and day out, for over thirty years, although he acknowledged, in a paraphrase of Cardozo that dramatically understates the matter, that "judging is fraught with uncertainty."<sup>27</sup>

The temptation to look for ways of curbing that uncertainty

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<sup>25</sup> See Wizner, *Passion in Legal Argument and Judicial Decisionmaking: A Comment on Goldberg v. Kelly*, 10 CARDOZO L. REV. 179 (1988).

<sup>26</sup> Brennan, *supra* note 16, at 12.

<sup>27</sup> *Id.* at 4.

is always great. This was, I believe, one of the driving forces behind the rise of law and economics and by implication the *Mathews v. Eldridge* formula. Evoking the scientism that surrounds economics and the formal language of mathematics associated with that discipline, law and economics, especially at the hands of Posner, promised a method—cost/benefit analysis—that might avoid or reduce the uncertainty of judging. Here was a method that was determinate and certain. There was, of course, nothing to this promise. It presupposed an end that is either vacuous or deeply contested and, in any event, it depended on a capacity to quantify values or contingencies that can not be quantified. But the appeal of the promise could not be denied, and there are passages in Justice Brennan's speech that suggest that his turn to passion might have been impelled by a similar consideration. It may be viewed as an attempt to move the judge to judgment in the face of uncertainty or, to use a familiar jurisprudential metaphor, fill the "gaps of the law" that might remain if there were nothing but reason.

A number of aspects of the original *Goldberg v. Kelly* decision remain shrouded in uncertainty even today. One arises from the risk, and it is only a risk, that the introduction of pretermination adversarial hearings might reduce the funds available for actual or potential welfare benefits. Is that risk a sufficient basis for declining to require pretermination hearings? This strikes me as the central dilemma of *Goldberg v. Kelly*, and although reason gives no easy answer to it,<sup>28</sup> neither does passion. In his speech, Justice Brennan focused on the hardship that would be imposed on the individuals whose benefits might be wrongly terminated, and in the name of passion, specifically invited an empathetic understanding of their situation. Of course, those people deserve our sympathy, but no more or less than those whose welfare checks might be reduced by the institutionalization of the pretermination procedure, assuming the risk that I spoke of were to materialize. Sympathetic figures appear on both sides of the issue, a fact underscored by the divi-

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<sup>28</sup> In *Goldberg v. Kelly*, Brennan disposed of the issue in these terms: "Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." 397 U.S. at 266.

sion among the justices. Justice Brennan, the author of the majority opinion, is indeed a passionate person, but so was Justice Black, who in dissent spoke out on behalf of those whose welfare checks might be reduced as a result of the new procedural requirement. It may be that one group of recipients is more deserving of our sympathy than the other, but even if that is so, there is no reason to believe that the question of desert—of determining who is more deserving of our sympathy—would itself be resolved on the basis of some feeling.

Often, but not always, our passions seem directed toward, or attached to, particulars: More often than not, we love particular people or activities, rather than abstract ideas. Building on this insight, one might be tempted to say that passion helps resolve the uncertainty present in *Goldberg v. Kelly* because it suggests favoring, or at least protecting, the particular individuals whose welfare benefits were about to be terminated—the plaintiffs in the suit. This might explain why in his Bar Association speech Justice Brennan quoted at length one of the briefs describing the hardship suffered by four welfare recipients (Angela Velez, Esther Lett, Pearl Frye and Juan DeJesus) and their families.

While mention was indeed made in the briefs of these four welfare recipients, little was known of them by the justices other than their names. These persons did not function as particulars to whom the justices might have become passionately attached, but rather were treated as legal mannequins, stand-ins for a group of persons consisting of all welfare recipients. That is why Justice Brennan could so easily dispose of the mootness objection arising from the fact that some or all of the named plaintiffs had already been restored to the welfare rolls. In dissent, Justice Black expressed concern for those who might be in desperate straits because of the newly imposed requirement of adversarial hearings, and though he did not use proper names to make his point, his concerns were no more general or particularized than Justice Brennan's. Both were speaking of aggregates or classes of people. *Goldberg v. Kelly* was no more about particular named persons, who might suitably be the object of our affections, than *Brown v. Board of Education* was about Linda Brown. Both were about social groups and what the Constitution promised

them.<sup>29</sup>

In suggesting that passion is no more a determinate guide to judgment than reason, thus far I have focused on the multiplicity of the objects of our affections; I have assumed that the passion was singular (sympathy), but that it may be distributed on both sides of the issue. The indeterminacy of impassioned judgment becomes even more pronounced, however, when we vary that assumption and acknowledge the multiplicity of passions as well: Like all of us, judges are complicated human beings who harbor not only feelings of sympathy, but also feelings of fear, contempt and even hate. A sympathetic attitude toward the recipient whose welfare is about to be terminated might point in one direction, perhaps in favor of the pretermination hearing, as Justice Brennan hypothesized. But imagine the judge (also) feeling that those recipients claiming a right to the hearing might well be the troublemakers who are driving the welfare system into bankruptcy. Once our horizons are thus enlarged, so as to account for both sympathy and its antithesis, the uncertainty of decision will be as acute and as profound as it is under "the empire of reason"; the "gaps of the law" will remain as persistent as ever.

A proper acknowledgment of the multiplicity of passions not only reinforces doubts about the usefulness of introducing passion in the decisional process, but also brings into focus the special danger entailed in celebrating passion as a basis, even a partial basis, for judicial decisions. The danger I allude to arises from the rather obvious fact that while some passions are good, others are quite bad. In a comment on Justice Brennan's speech, Professor de Grazia draws a distinction between the passions to be allowed and those to be disallowed.<sup>30</sup> He calls one "humanistic" and the other "authoritarian," and then uses "respect for human dignity" as the standard for distinguishing the two categories. Love is to be allowed; hate is not.

As a gloss on what Justice Brennan had in mind, Professor de Grazia's scheme seems unobjectionable. However, one must wonder at the utility of the entire exercise because it can rescue passion only by reference to an ideal—"respect for human dig-

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<sup>29</sup> Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107 (1976).

<sup>30</sup> de Grazia, *Humane Law and Humanistic Justice*, 10 CARDOZO L. REV. 25, 29 (1988).

nity”—that is itself in need of rational elaboration. We need to know, for example, whether fear shows disrespect, or whether it might be a special form of respect. The need to answer questions like this, or otherwise elaborate the ideal of “respect for human dignity,” adds a new element of uncertainty in the decisional process. Even more importantly, it renders the entire turn to passion redundant. Once we come to understand what it means to respect the dignity of another it is unlikely that we need to have recourse to passion in the first place.

Even assuming that somehow we could sort the passions in the way that Justice Brennan or Professor de Grazia wishes, and thus be certain that we are permitted only love, not hate, there is still reason to be worried about encouraging or valuing passion as a basis for public action. By its very nature, love, or at least earthly love, not only invites a certain partisanship (nepotism in all its forms), but allows the person possessed by love to favor one individual or another for purely arbitrary reasons, for no reason at all, or for reasons that are ineffable.<sup>31</sup> An unanalyzed and unanalyzable sentiment—passion in all its glory—should not only be acknowledged, but encouraged and valued in choosing a friend or a lover, or deciding why I might give more of my resources to my child than some charity, or deciding why I might garden rather than write an article. Nevertheless, it seems to be a highly questionable basis for decision for a court of law.

Allowing passion to play a role in the decisional process of the Supreme Court—even if the passion be the most beneficent imaginable or even if the role be a modest or partial one—is inconsistent with the very norms that govern and legitimate the judicial power and constitute its central disciplining mechanism: impartiality and the obligation of the judiciary to justify its decisions openly and on the basis of reasons accepted by the profession and the public. These features of the judicial process are not infallible, obviously, but they do at least place the judiciary under a discipline that is gone once passion becomes an appropriate basis of decision. Why, we are left to ask, should the passions of those who happen to be justices rule us all?

At several points in his lecture, Justice Brennan seemed to be making a point not about passion, but about social reality

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<sup>31</sup> Minow and Spelman speak of “non-arbitrary passion,” *supra* note 21, at 47, but that strikes me as an oxymoron.

and the perception of reality. He criticized “*formal reason*”<sup>32</sup> or “*pure reason*”<sup>33</sup> and speaking of *Goldberg v. Kelly* itself, he said that “[t]he Court . . . sought to leaven reason with experience.”<sup>34</sup> In this regard, he seemed to be recommending that decisions should be based on a full and true appreciation of social reality. If that is what he was proposing, I am in complete agreement. It is important, however, to distinguish this insistence on empiricism from his claim that reason be leavened with passion or that the commitment of the judge to reason be qualified by allowing a role for passion. Passion is not experience, nor a privileged means of gaining access to experience, even if the experience in question be the suffering of those on welfare. Experiences may trigger passions, but experiences may also stir thoughts, and be the subject of reflection and deliberation. Granted, reason sometimes operates at a totally abstract level, wholly removed from experience, as it does in mathematics, but it need not. When it comes to making practical judgments, as in the case of ethics or law or politics, that is hardly the ideal. In these domains, the best judgment is one that is fully sensitive to, and cognizant of, the underlying social reality.

As I already acknowledged, passion tends toward the particular, and, in that sense, does not pose the same danger of abstractness or remoteness as do certain formal systems of reason like mathematics. But it is important to understand that passion and, even more, its associated form of discourse, storytelling, might create the opposite danger: so thorough an involvement in the particular as to confuse the particular with social reality. The description in appellees’ brief of the plight of Angela Velez, Esther Lett, Pearl Frye and Juan DeJesus and their families—in truth no more a story than a letter to Ann Landers is a work of literature—might have triggered an emotional response, but it would have been a mistake of the first order for the Court to have let these so-called “human stories” stand for the social reality over which it governs.

Because it lays down a rule for a nation and invokes the authority of the Constitution, the Court necessarily must concern itself with the fate of millions of people, all of whom touch

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<sup>32</sup> Brennan, *supra* note 16, at 17 (emphasis added).

<sup>33</sup> *Id.* at 10 (emphasis added).

<sup>34</sup> *Id.* at 21.

the welfare system in a myriad of ways: some on welfare, some wanting welfare, some being denied welfare, some dispensing welfare, some creating and administering welfare, some paying for it. Accordingly, the Court's perspective must be systematic, not anecdotal: It should focus not on the plight of four or five or even twenty families, but consider the welfare system as a whole, which can only be understood as a complex interaction between millions of people and a host of bureaucratic and political institutions. The methods by which a court comes to know and understand a system as far-ranging and as complex as welfare are complicated and, as in the case of *Goldberg v. Kelly* itself, always in need of further refinement and improvement. But to describe these informational methods as storytelling, as has become fashionable these days on the left, trivializes what is at stake, unfairly disparages the enormous progress modern society has made in developing sophisticated techniques for assembling, presenting and evaluating empirical information, and throws into doubt the basic aspirations of all these informational processes, namely, finding the truth.<sup>35</sup> A story is a story, sometimes a very good one, even if completely untrue.

For twenty years now, *Goldberg v. Kelly* and its jurisprudential method have been embattled, as has the entire legacy of the Warren Court. As I noted, for the most part it had to be protected from the instrumentalism of law and economics and *Mathews v. Eldridge*. Justice Brennan's Bar Association speech, as is true of the work of critical race theorists and a number of feminists, can be understood as part of this struggle. It can be seen as a rejection of the theoretical underpinnings of law and economics and *Mathews v. Eldridge* and an expression of the profound inadequacy of what, for the controlling majority of the Supreme Court these days, passes as reason. On this view, Justice Brennan's speech and the new version of *Goldberg v. Kelly* should be welcomed and embraced and applauded by all who care about law. I am troubled, however, by the terms of his critique, for by valorizing passion rather than calling for the enrichment of its antithesis, Justice Brennan appears to have surrendered reason to the instrumentalists, and left the idea of substantive rationality more exposed than ever. His celebration

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<sup>35</sup> The relationship between storytelling and debunking the idea of truth is explicit in Delgado. See Delgado, *supra* note 20.

of passion not only seems unresponsive to our present needs, which call for more, not less, reflection and deliberation, but endangers so much that is good about the law. Qualifying the judiciary's commitment to reason undermines its authority and weakens the principal means we have for guarding against abuses of the judicial power. It reduces the pressure on the justices to reflect deliberately and systematically on the issues before them and to justify their decision in each and every particular.

Of course, on the issue of what actually moved the justices in *Goldberg v. Kelly*, Justice Brennan will have the last word (I guess), but only by putting the authority of that decision into question. *Goldberg v. Kelly* is a great case, and fully worthy of this celebration, but I believe that no part of its grandeur derives from the possibility that some of the justices were emotionally responding to the so-called "human stories" of Angela Velez, Esther Lett, Pearl Frye and Juan DeJesus. The issue before the Court was whether the welfare system as a whole was being operated in accordance with the ideal of procedural fairness, and in reaching judgment, the justices were guided by reason and reason alone.

On this account, *Goldberg v. Kelly* was truly a magnificent achievement, and today should be seen as a monument to our own little enlightenment—that extraordinary age of American law when we understood the promise of reason and boldly acted on that understanding. Resisting attacks from the right and left, *Goldberg v. Kelly* still stands at the center, inspiring a new generation of lawyers by example: teaching them what law was and could be.